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No. 06-28

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In The
Supreme Court of the United States

JANET LUTKEWITTE,

Petitioner,

v.

ALBERTO GONZALES,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia

REPLY BRIEF FOR PETITIONER

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ARGUMENT

I. THE UNITED STATES IN THIS COURT HAS TAKEN CONFLICTING POSITIONS REGARDING WHAT CONSTITUTES A TANGIBLE EMPLOYMENT ACTION

The United States offers a straightforward account of the definition of a tangible employment action. A tangible employment action, it insists, means a "significant change in employment status." (Br. Opp. 6, 8, 9, 10). The articulation of that standard in the government's Brief in Opposition is clear, emphatic, and consistent.

The government, however, was just as clear, emphatic and consistent less than three years ago in *Pennsylvania State Police v. Suders*, 524 U.S. 129 (2004), where the Solicitor General with equal certainty insisted – to the contrary – that a tangible employment action is "an official action." In its amicus brief in *Suders*, the United States used the phrase "official action" 37 times in articulating, and applying, what the government there asserted constituted the definition of a tangible employment action under *Ellerth*.[1] The government advanced an unambiguous interpretation of *Ellerth*: "strict liability is triggered by an official act of the enterprise."[2] During the oral argument in *Suders*, speaking with the studied consistency, counsel for the United States on 11 occasions insisted that a tangible employment action is an "official action,"[3] not once referring to the passage in *Ellerth* – which the Brief in Opposition now deems controlling – referring instead to a significant change in employment status.

The Solicitor General's insistence in *Suders* that an official action is a tangible employment action was central to the government's position in that case. The issue in

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[1] We set forth each of those passages in an appendix to this brief.

[2] Brief for the United States as Amicus Curiae, *Pennsylvania State Police v. Suders*, No. 03-95, p. 25.

[3] We set forth in an appendix to this brief those statements from the oral argument.

Suders was whether a constructive discharge constitutes a tangible employment action under *Ellerth*. The Third Circuit had held that a constructive discharge is a tangible employment action, resting its conclusion on the premise that a tangible employment action is a "significant change in employment status."

> [O]ur inquiry is not whether an action may be caused by a co-worker or supervisor, it is whether the supervisor's action constitutes a "significant change in employment status." [*Ellerth*, 524 U.S.] at 761.

Suders v. Easton, 325 F.3d 432, 457 (3d Cir. 2003).[4] "[A] constructive discharge 'constitutes a significant change in employment status,' by ending the employer-employee relationship. *Ellerth*, 524 U.S. at 761." 325 F.3d at 460. In this Court the decision of the Third Circuit was defended on the ground that under *Ellerth* a tangible employment action means "a significant change in employment status."[5]

It was in response to that argument that the United States insisted in *Suders* that the correct definition of a tangible employment action is not, as the Third Circuit thought, "a significant change in employment status," but instead "an official act." The government argued persuasively that under *Ellerth* it is the use of official power by the harasser (not the type of effect that official action had on the victim) that results in strict liability. "*Ellerth*

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[4] See 325 F.3d at 451 ("The [Supreme] Court's discussion of the attributes of a tangible employment action is critical to the present case. In broad strokes, a tangible employment action 'constitutes a significant change in employment status.' *Ellerth*"), 457 n.16 ("[T]his court concludes that, under the Supreme Court's definition [in *Ellerth*], it is the *nature of the harm inflicted* by a supervisor – that is, 'a significant change in employment status' . . . – that determines whether the supervisor's action is a 'tangible employment action,' not whether a co-worker could also inflict the harm.") (*quoting Cherry v. Menard, Inc.*, 101 F. Supp. 2d 1160, 1172-73 (N.D. Iowa 2000) (emphasis in original)).

[5] *Pennsylvania State Police v. Suders*, No. 03-95, Brief for Respondent, p. 20; Brief Amicus Curiae for the Lawyers' Committee for Civil Rights, pp. 10, 21.

implemented the common law principle that an employer is liable for the acts of its agents when the agent was aided by the agency relationship, and the existence of an official act ensures that the supervisor's misconduct was aided by the agency relationship."[6]

II. THE DECISIONS OF THIS COURT OFFER CONFLICTING EXPLANATIONS OF WHAT CONSTITUTES A TANGIBLE EMPLOYMENT ACTION

This Court, of course, does not grant certiorari to resolve conflicts in the positions taken by the Solicitor General. But the fact that the United States can and has cited *Ellerth* for two flatly inconsistent definitions of a tangible employment action provides stark illustration of the problems created by the conflicting standards set out in *Ellerth*. As we explained in the petition, *Ellerth* contains at least two different definitions of a tangible employment action: a significant change in employment status and an official action. (Pet. 14-16). In this case, as in *Suders* and many other cases, whether an employer is strictly liable depends on which of these two conflicting definitions is utilized. Absent a definitive statement by this Court as to which of these definitions is correct, the government or any other litigant[7] can quote whichever of

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[6] Brief for the United States as Amicus Curiae, *Pennsylvania State Police v. Suders*, No. 03-95, p. 9; see *id.* at 21 ("The existence of an official act . . . establishes 'beyond question' that the supervisor has been aided by the agency relation in victimizing the employee.").

[7] The government's action in advancing different *Ellerth* standards, depending on which will lead to the desired result, is far from unique. Other litigants have done so as well. *Compare* Brief Amicus Curiae of the Equal Employment Advisory Council, *Pennsylvania State Police v. Suders*, No. 03-95, p. 8 (arguing that under *Ellerth* a tangible employment action is "an official act," not a significant change in employment status) *with* Brief Amicus Curiae of the Equal Employment Advisory Council, *Burlington Northern & Santa Fe Rwy. Co. v. White*, No. 05-259, p. 9 (arguing that under *Ellerth* a tangible employment action is "a significant change in employment status," not an official act); *compare* Brief Amicus Curiae of the Society for Human Resource Management,

(Continued on following page)

the two *Ellerth* standards it pleases, varying the choice of definition to conform to its litigation interests in each case, and the lower courts cannot find in *Ellerth* itself any principled basis for choosing between those competing definitions of a tangible employment action.

In *Suders* this Court repeatedly stated without qualification that a tangible employment action is "an official act"; the Court's opinion used the term "official" a dozen times to delineate the actions which give rise to strict liability. (See Pet. 16-19). The United States, however, insists that *Suders* is not to be read literally; it argues that many official acts are not an "official act" within the meaning of *Suders*. Rather, the government contends that "[t]he Court in *Suders* was simply using the term 'official act' . . . to refer to official actions that significantly change employment status." (Br. Opp. 8). Official acts that do not cause that particular consequence, the government asserts, are not "official acts" in the legal sense.

That cannot be correct. There is not a single passage in *Suders*, *Ellerth*, or *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998), which suggests that "official act" excludes official acts that lack certain consequences, such as official acts that do not cause "significant change in employment status." This Court has never even used "official action" and "significant change in employment status" in the same paragraph. Limiting the concept of official action to uses of official authority that have a particular type of impact, moreover, would be inconsistent with the very reason why this Court in *Suders* imposed strict liability for official conduct. Under the agency principles applied in *Suders* (and in *Ellerth* and *Faragher*), the controlling question is

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Pennsylvania State Police v. Suders, No. 03-95, p. 10 (arguing that under *Ellerth* a tangible employment action is "an official act," not a significant change in employment status) *with* Brief of the Society for Human Resource Management, et al., as Amici Curiae, *Burlington Northern & Santa Fe Rwy. Co. v. White*, No. 05-259, p. 7 (arguing that under *Ellerth* a tangible employment action is "a significant change in employment status," not an official act)

whether the harasser "was aided in accomplishing [the harassment] by the existence of the agency relation." *Ellerth*, 524 U.S. at 760 (*quoting* Restatement (Second) of Agency, § 219(2)(d)). A harasser clearly is aided in the harassment by that agency relation whenever the harasser utilizes his official authority to engage in sexual harassment, regardless of the particular manner in which that use of official authority affects the victim.

Most compellingly, the actual outcome in *Suders* cannot be reconciled with the government's assertion that whenever the opinion said "official act" it meant "official act causing a significant change in employment status." There was no claim in *Suders* that the harassing supervisors had ever in any way altered the plaintiff's employment status. Ms. Suders' resignation was precipitated by a scheme on the part of her supervisors to arrest Suders in connection with certain disputed computer skills exams; she quit shortly after the arrest. Despite the absence of any officially ordered change in Suders' employment status, this Court remanded the case for further consideration, explaining:

> Although most of the discriminatory behavior Suders alleged involved unofficial conduct, the events surrounding her computer-skills exams . . . were less obviously unofficial.

542 U.S. at 152 n.11. If, as the government now contends, the term "official" in *Suders* meant "officially ordered significant change in employment status," this critical portion of the actual holding in *Suders*, and the outcome of that case, would make no sense. The arrest of Suders clearly was an official act, and may well have involved the use of official supervisory power, but that arrest emphatically did not in any way alter Suders' employment status. The government's new interpretation of "official" is inconsistent as well with the argument which the United States advanced in *Suders* that that arrest incident could constitute an "official" action.[8]

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[8] See pp. 5a, 6a, *infra*.

III. THE COURTS OF APPEALS ARE IN CONFLICT REGARDING WHAT CONSTITUTES A TANGIBLE EMPLOYMENT ACTION

The United States insists that the courts of appeals are in agreement that action by a supervisor constitutes a tangible employment action if and only if the supervisor orders a "significant change in the employment status" of the plaintiff. (Br. Opp. 10-11). That assertion is palpably incorrect.

The government contends that the Ninth Circuit in *Holly D. v. California Institute of Technology*, 339 F.3d 1158 (9th Cir. 2003), "did not [hold] that a supervisor's assertion of official authority is sufficient to render an employer strictly liable, even when there has been no significant change in employment status." (Br. Opp. 10). To the contrary, that is precisely the holding in *Holly D.*. In that case there was no change whatever in the employment status of the plaintiff; the plaintiff, who submitted to the sexual desires of her supervisor, retained without alteration her job, title, assignments, and wages. The Ninth Circuit nonetheless reasoned that strict liability would be triggered if the harasser used his official authority by threatening to fire the victim if she did not submit, even though her submission meant that no change in employment status ever occurred.

> [T]he supervisor in such cases exercises the authority to make the . . . final decision to *retain* the employee in her position. In doing so, he makes the employee's *continued* employment contingent on her willingness to accede to his sexual demands.

339 F.3d at 1169 (emphasis added). The basis of liability under *Holly D.* was that the supervisor – although not altering the plaintiff's employment status – had invoked his official authority to facilitate the harassment. "'[O]nly a supervisor, or other person acting with the authority of the company,' *Ellerth*, 524 U.S. at 762, can successfully employ this sort of leverage." 339 F.3d at 1169.

The government insists that "instead" of holding that the use of official authority triggers strict liability, the Ninth Circuit ruled that an employer is liable in a submission case because "the participation in unwanted sexual acts becomes a condition of the employee's employment." (Br. Opp. 10, *quoting* 339 F.3d at 1169). But the District of Columbia Circuit (like the government) insists that strict liability arises, not from all modifications in the circumstances of employment, but only from those alterations that constitute "significant change[s] in employment status." If an employee submits to a supervisor's sexual demands, as Holly D. assertedly did in order to keep her job, the *conditions* to which she is subject in connection to her job do change, but her employment *status* – her job title, assignment, wages, etc. – are unaffected. The Ninth Circuit used the unrestricted phrase "condition of employment," rather than "employment status," precisely because only the first phrase encompasses – in *Holly D.* (and here) – cases in which official authority is used to facilitate the harassment, but not to alter the victim's employment status. The issuance of *any* official order (whether an order to provide a sexual favor or an order to go to the New York office) makes compliance a "condition of the employee's employment."

Similarly, in *Jin v. Metropolitan Life Insurance Co.*, 310 F.3d 84 (2d Cir. 2002), the Second Circuit found that a tangible employment action would occur if the plaintiff, in order to *prevent* any change in her employment status, obeyed the harasser's order to come to his office (where she was sexually abused) or an order to submit to such abuse. 310 F.3d at 94 (plaintiff "continued employment"; harasser "allowed [plaintiff] to keep her job" and to "retain her employment), 95 (harasser granted plaintiff "retention of her employment.") Like the Ninth Circuit in *Holly D.*, the Second Circuit in *Jin* reasoned that the critical inquiry was whether the harasser had wielded official authority that a mere co-worker would lack.

> It was [the harasser's] employment by MetLife as an agent who could make economic decisions affecting employees under his control that enabled

> him to force Jin to submit to his weekly abuse. Another co-worker could not have so compelled Jin's acquiescence because a mere co-worker lacked the authority to terminate or retain Jin. . . .

310 F.3d at 94.

The United States contends that *Jin* held that a supervisor brings about a "significant change in employment status" when, without in any way altering the victim's position, wages, hours or duties, the supervisor uses his authority to require the victim (in order to preserve her employment status) to obey an order. (Br. Opp. 10). But this argument seeks to redefine "significant change in employment status" to mean something like "the preservation without change of employment status that was assured because the victim obeyed an official order by the harasser." If that is what *Jin* and the United States mean by "significant change in employment status," both are in conflict with the decision below.

The District of Columbia Circuit in this case expressly limited tangible employment action to a "significant change in employment status" (Pet. App. 4a), giving those words their ordinary meaning – there must actually be a change in employment status. That holding conflicts, not only with the Ninth and Second Circuit decisions in *Holly D.* and *Jin*,[9] but also with decisions in five circuits that the *denial* of a promotion – an official action which leaves a worker's employment status unchanged – constitutes a tangible employment action.[10]

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[9] The United States suggests that the Second and Ninth Circuits have since repudiated the decisions in *Jin* and *Holly D.*, and now hold that an actual change in employment status is required to constitute a tangible employment action. (Br. Opp. 10). In the cases relied on by the government, however, the issue presented was not – as in *Jin* and *Holly D.* – whether the harasser had used his authority to facilitate the harassment, but whether the harasser had used his authority to take action against the plaintiff because she had rejected his advances.

[10] *Godin v. Whirlpool Corp.*, 132 Fed. Appx. 661, 664 (7th Cir. 2005); *Petrosino v. Bell Atlantic*, 385 F.3d 210, 226 (2d Cir. 2004);

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IV. THIS CASE PRESENTS AN APPROPRIATE VEHICLE FOR RESOLVING THE QUESTION PRESENTED

This case presents with crystalline clarity the issue of whether a tangible employment action is "an official act" or "a significant change in employment status." As the government correctly observes, Lutkewitte's supervisor "directed petitioner to travel to New York on FBI business." (Br. Opp. 2). That without question was an official act involving a direct exercise of the supervisor's authority over his subordinate. No mere fellow employee, or even a higher ranking FBI official without supervisory authority over Lutkewitte, could have issued such a command. If official action taken to perpetrate sexual harassment is a tangible employment action under *Ellerth* and *Suders*, that standard unquestionably was satisfied here. The record regarding this issue is fully developed; indeed, the relevant facts are not even in dispute. The United States has never denied that the harasser in this case gave Lutkewitte an official order to report to the FBI's New York office.

The absence of a district court opinion is no impediment to review by this Court. The question presented in this case was framed by the decision of the district court refusing to give a requested jury instruction. The terms of the disputed instruction frame the underlying legal issue with precision. (Pet. 10) Trial judges rarely if ever write opinions to explain their decisions granting or denying jury instructions; in the past this Court has repeatedly granted certiorari to resolve a dispute regarding jury instructions despite the absence of such an opinion.[11]

LaDay v. Catalyst Technology, Inc., 302 F.3d 474, 482 (5th Cir. 2002); *Frederick v. Spring/United Mgt. Co.*, 246 F.3d 1305, 1312 (11th Cir. 2001); *Morris v. Oldham County Fiscal Court*, 201 F.3d 784, 789 (6th Cir. 2000).

[11] *E.g., Washington v. Recuenco*, 126 S. Ct. 2546, ___ U.S. ___ (2006); *Dixon v. United States*, 126 S. Ct. 2437, ___ U.S. ___ (2006);

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CONCLUSION

For the above reasons, a writ of certiorari should issue to review the judgement and opinion of the District of Columbia.

Respectfully submitted,

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References to "Official Act"
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"Under *Ellerth*, a constructive discharge triggers strict liability when it results from a supervisor's official act." (p. iii)

"Unless a constructive discharge is effected through a supervisor's official act, the employer may avoid vicarious liability by establishing the elements of the defense recognized in *Burlington Industries, Inc. v. Ellerth*." (p. 7)

"[*Ellerth*] holds that a tangible employment action 'requires an official act of the enterprise. . . .'") (p. 9)

"Under *Ellerth*, a constructive discharge triggers strict liability only when it results from a supervisor's official act. . . ." (p. 9)

"The court of appeals' view . . . is inconsistent with *Ellerth's* holding that a tangible employment action requires an official act." (p. 9)

"[T]he existence of an official act ensures that the supervisor's misconduct was aided by the agency relationship." (p. 9)

"Absent an official act, the extent to which a supervisor has been aided by the agency relationship is much less clear." (p. 9)

"An employer has far less ability to control a supervisor's workplace harassment when it is unaccompanied by an official act. . . ." (p. 9)

"An employee's decision to resign, in the absence of an official act, does nothing to enhance the degree of control over the supervisor's conduct." (p. 10)

"[T]he court of appeals . . . did not conduct a thorough analysis of whether respondent's alleged constructive discharge resulted in significant part from a supervisor's official act or acts." (p. 10)

"An employer is strictly liable for a constructive discharge when the constructive discharge results from a supervisor's official act" (p. 10)

"[T]he First and Seventh Circuits have held that a constructive discharge can be a tangible employment action, but only if it is caused by a supervisor's 'official act.' . . . The First and Seventh Circuits have adopted the correct view." (p. 11)

"A constructive discharge constitutes a 'tangible employment action' within the meaning of *Ellerth* and *Faragher* when the constructive discharge results in whole or in significant part from a supervisor's official act or acts." (p. 11)

"[*Ellerth*] elucidated that a tangible employment action 'requires an official act. . . . '" (p. 19)

"Under *Ellerth*, a constructive discharge triggers strict liability when it results from a supervisor's official act." (p. 21)

"Under the *Ellerth* analysis, only a constructive discharge effected in whole or in significant part through a supervisor's official act is the kind of 'tangible employment action' that triggers strict liability. . . . " (p. 21)

"[U]nder *Ellerth*, a tangible employment action is an action that 'requires an official act. . . . '" (p. 21)

"[R]espondent's supervisor['s] . . . repeated daily practice of grabbing his groin area and yelling, in respondent's presence, 'suck it' . . . did not constitute an 'official act of the enterprise' under *Ellerth*. . . . " (p. 22)

"[U]nder *Ellerth*, the existence of an official act is not something that can be dispensed with. . . . " (pp. 22-23)

"Under *Ellerth*, a tangible employment action 'requires an official act of the enterprise. . . . '" (p. 23)

"The considerations that underlie *Ellerth's* distinction between tangible employment actions and other supervisory conduct demonstrate why an official act should remain a necessary prerequisite to strict liability." (p. 23)

"The existence of an official act . . . establishes 'beyond question' that the supervisor has been aided by the agency relation in victimizing the employee." (p. 23)

"Absent an official act, the extent to which the supervisor has been aided by the agency relation is less certain." (p. 23)

"[B]ecause official acts 'in most cases' are 'documented in official company records . . . ' . . . they are the acts over which employers can exercise the most control." (p. 23)

"The employer's ability to control and prevent unlawful official action provides a crucial justification for holding an employer strictly liable. . . . " (p. 23)

"When there is no official act, an employer's ability to control a supervisor's conduct and prevent a supervisor's misconduct diminishes." (pp. 23-24).

"[W]hile an actual termination is always effected through an official act of the company, a constructive discharge may be effected through co-worker conduct, unofficial supervisory conduct, or official company acts." (p. 24)

"A constructive discharge involves both an employee's decision to leave and precipitating conduct. The former involves no official action, and the latter may or may not involve official action. Under *Ellerth*, those differences are critical for purposes of determining the correct vicarious liability principle." (p. 24)

"Strict liability is triggered by an official act of the enterprise. . . . " (p. 25)

"[U]nless the resignation has been precipitated by an adverse official act, . . . an employee would have no reason to view the resignation as anything other than one of the innumerable voluntary resignations that occur daily in this nation's workforce." (p. 25)

"Under *Ellerth*, a constructive discharge is a tangible employment action when it is effected through a supervisor's official act." (p. 26)

"A demotion is one of the official acts specified in *Ellerth*." (p. 26)

"If . . . the . . . official act results in a constructive discharge, agency principles similarly justify holding the employer strictly liable. . . . " (p. 26)

"The First and Seventh Circuit decisions provide good examples of how the 'official act' standard operates in practice." (p. 27)

"The case should be reversed and remanded for a determination whether respondent's supervisor's committed an official act." (p. 28)

"[T]he court of appeals . . . did not undertake a thorough analysis of whether any of the actions that allegedly precipitated respondent's constructive discharge was an official act." (p. 28)

"[T]he case should be remanded for a determination whether respondent's alleged constructive discharge resulted in significant part from an official act or acts." (p. 28)

References to "Official Act"
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"An employer is strictly liable for a constructive discharge in any harassment that has preceded it only when the constructive discharge comes about as a result of an official company act" (p. 17)

"[T]he requirement of an official company act as a predicate for strict liability comes from the Court's decision in *Ellerth*. . . . " (p. 18)

"[R]ecognizing the affirmative defense when there's not an official company act, further title VII's prophylactic purposes. . . . " (p. 18)

"We would say that you would remand because it is possible that there is a – an official company act that caused the constructive discharge." (p. 23)

"[T]he sequence of events leading up to the arrest, and that arrest might be – we're not saying that it is – but it might be an official act. . . . " (p. 23)

"QUESTION: How – how could the – how could the arrest b[e] an official company act?

MR. GORNSTEIN: It could be an official company [act] if it is only the sort of thing – if it depends on a grant of authority from the employer to the supervisor and it's only the sort of thing that a supervisor could do." (p. 23)

"It only is a tangible employment action if it's brought about by an official company act. . . . " (p. 25)

"If it's not brought about by an official company act, then the . . . affirmative defense [might be available]." (p. 25)

"There would be an affirmative defense to the hostile environment claim if the hostile environment culminates in a constructive discharge that's not affected by an official company act." (p. 25)

"[W]hat's . . . missing [in the Third Circuit standard] . . . is that *Ellerth* requires an official company act to have a tangible employment action. . . . " (p. 26)

"[I]f there's not an official company act, then the employer has the affirmative defense." (p. 26)

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